

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

TROPICAL PROPERTIES OF THE KEYS, INC.,

Plaintiff

v.

GAN NORTH AMERICAN INSURANCE
COMPANY, and ARMADA ASSURANCE
LIMITED

Defendants

CASE NO. 99-10063-CIV-KING

ORDER DENYING PLAINTIFF'S MOTION TO REMAND AND GRANTING

DEFENDANT GAN'S MOTION TO DISMISS

THIS CAUSE comes before the Court on Plaintiff's Motion to Remand, filed July 8, 1999, and Defendant Gan's Motion for Judgment on the Pleadings filed July 23, 1998. Defendant filed its response to the Motion to Remand on July 23, 1999. Plaintiff filed its response to the Motion for Judgment on the Pleadings on August 20, 1999.

Factual Summary

This case arises out of an underlying action that is pending in the Circuit Court for Monroe County, Florida. That case is captioned Daniel Lusigan v. Tropical Properties Of The Keys. d/b/a BUCCANEER RESORT & HOTEL. Case No. 97-10242CA11. Mr. Lusigan is seeking to recover for injuries suffered when someone fell on his foot while he was at Plaintiff's bar.

Defendant Armada allegedly issued an insurance policy to the Plaintiff for coverage from October 26, 1995 through October 26, 1996. Defendant Gan allegedly issued a policy for coverage from October 26, 1996 to October 26, 1997. Mr. Lusigan was injured on August 18, 1996, and did not file suit until

February 27, 1997. When the sub was filed, Plaintiff claims to have submitted the claim to its insurance company at the time, Gan, rather than the company who issued the policy for the period of time during which the accident actually occurred, Armada. Gan, apparently unaware that the policy they issued did not provide coverage for the date the accident occurred, is said to have defended the claim for approximately sixteen (16) months. At that time, Gan realized that the accident occurred outside of the policy period and withdrew from representing Plaintiff. Plaintiff claims that Armada then defended the claim for a short time before also withdrawing. Armada claimed that it was not under an obligation to defend since they were harmed by the delay in being notified of the claim and by an allegedly inadequate defense provided by Gan and its selected lawyers.

Plaintiff filed this suit in State Court against both insurance companies on April 26, 1999. On June 10, 1999, Gan removed this case pursuant to 28 U.S.C. 1441(a). Now Plaintiff seeks to remand the case, claiming that the underlying suit for damages will decide the coverage questions before this Court.

Defendant Gan alleges that the Court should enter a judgment on the pleadings with respect to both counts of the complaint. Gan claims the first count, which alleges a cause of action arising out of a violation of a Florida Statute governing the assertion of a coverage defense, should be dismissed because no "coverage" existed to "defend." As for the second count, for breach of contract, Gan argues that no breach could have occurred because the contract was not in effect when the accident occurred. Plaintiff responds that the motion should be denied as to both counts, and points to case law which deal with promissory estoppel claims brought under comparable factual scenarios.

Discussion

A. Motion to Remand

The Declaratory Judgment Act, 28 U.S.C. § 2201, gives District Court Judges the discretion to abstain from exercising jurisdiction over declaratory judgment actions. The exercise of the discretion to abstain can and does serve a variety of purposes. It prevents inconsistent rulings in state and federal courts and also prevents the waste of judicial resources, Since state courts maybe more experienced in deciding difficult issues of state law, abstention can serve to further the interests of justice. In addition, abstention can prevent friction that might result if a State Court Judge were to resent the fact that a Federal Court Judge was deciding issues that also existed in one of the State Judge's cases. In an oft quoted passage, the Supreme Court observed:

By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of Its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or alter all arguments have drawn to a close.

Wilton v. Seven Falls Co., 515 US. 277, 288 (1995). However, this holding was limited to cases in which underlying parallel state court suits were pending: "We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, ... cases in which there are no parallel state proceedings." Id. at 290.

The Plaintiff asserts that the underlying action in state court is a parallel proceeding because the same issues will be decided in that case. Ven-Fuel. Inc. v. Department of the Treasury, 673 F.2d 1194,1195(11* Cit. 1982). A District Court Judge must ask "whether the claims of all parties can satisfactorily be adjudicated in that proceeding" when determining whether abstention is proper. Brillhart v. Excess, 316 U.S. 491, 495 (1942). Since

the insurance companies who are the Defendants in this action are not parties to the state court action, the claims brought against them could not be resolved in state court. That case involves only the question of whether the Plaintiff is liable for damages. Insurance coverage is not an issue in the case.

The issues of whether or not Plaintiff is insured for the accident and by whom will not be decided by the state court case. Therefore, this Court will not abstain.

B. Motion for Judgment on the Pleadings

Motions for Judgment on the Pleadings are governed by Rule 12(c) of the Federal Rules of Civil Procedure, which provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56,

"Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." Bankers Ins. Co. v. Florida Residential Property and Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1295 (11th Cir. 1998). Courts may not dismiss a complaint on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson 355 U.S. 41, 45-46 (1957); see also Slagle v. ITT Hartford 102 F.3d 494, 497 (11th Cir.1996).

The first count of the complaint alleges a violation of Florida Statute § 627.426(2), which requires that an insurer invoke any coverage defenses in a timely manner. The Florida Supreme Court has held that "a disclaimer of liability based on a complete lack of coverage" does not constitute a coverage defense. AIU Ins. Co. v. Block Marina Investment, Inc., 544 So.2d 998, 1000 (Fla. 1989). See also Almendral v. Security National Ins. Co., 704 So.2d 728,730(3rd DCA 1998) (Holding that defense of "no coverage" is not a "coverage defense") The Plaintiff's own complaint alleges that Defendant Gan disclaimed liability based on the fact that the accident occurred outside of the policy period. Such a disclaimer is "based on a complete lack of coverage," as in AIU Insurance Thus, this Court finds the "coverage defense" statute inapplicable.

Plaintiff also asserts that Gan breached the contract of insurance when they failed to diligently investigate the claim. Since both sides agree that the contract was not in effect when the accident occurred, this Court finds that Gan owed no contractual duty to investigate the claim. If a duty was owed, it did not emanate from the insurance contract itself. Therefore, the breach of contract claim can not be sustained.

Plaintiff is correct in pointing out that they may be entitled to relief based on estoppel or on detrimental reliance. However, the Plaintiff has failed to properly plead these causes of action in its complaint.

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Plaintiff's Motion to Remand be, and the same is hereby, DENIED.

It is further

ORDERED and ADJUDGED that Defendant Gan's Motion for Judgment on the Pleadings be, and the same is hereby, GRANTED. Counts I and II of the complaint are hereby DISMISSED without prejudice and with leave to amend the

complaint to allege estoppel and/or detrimental reliance within twenty (20) days hereof.

DONE and ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 1st day of September, 1999.

JAMES LAWRENCE KING
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA